No. 162

FILED
JUN 26 1952

IN THE

Supreme Court of the United States

JUNE TERM 1952

ASTRA PICTURES INC.,

Petitioner,

against

EUREKA PRODUCTIONS INC., JEWEL PRODUCTIONS INC., SAMUEL CUMMINS and ROSE CHATKIN,

Respondents.

PETITION AND BRIEF FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MELVIN A. ALBERT,
Attorney for Petitioner.

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Astra Pictures Inc., plaintiff in this action, respectfully prays for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review a determination of that court entered on March 28, 1952, which reversed an interlocutory judgment (527) * of the United States District Court for the Southern District of New York (temporarily enjoining infringement of a copyrighted motion picture and referring the fixation of damages to a Special Master) and dismissed the complaint herein.

There is no dispute as to the ultimate facts here involved; the reversal was solely upon the ground of defect of parties-plaintiff, and the court's sua sponte interpretation of a governing contract, which interpretation was not urged by defendants-respondents. They never at any time

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* Numbers in parentheses refer to pages of record.

urged the point of defect of parties-plaintiff. The opinion of the Court of Appeals fully discussing the facts is set forth as an Appendix hereto for the convenience of the court.

Statement of Matters Involved

Petitioner plaintiff charged in its complaint that defendants had infringed its copyright in the motion picture "Ecstacy". Such copyright had originally been taken out by defendants-respondents Eureka and Cummins and eventually assigned to petitioner (3-7). There was no defense to the fact of infringement.

Defendants-respondents set up as an affirmative defense that one Machaty was the owner of the copyrights in question, that they had obtained the right to distribute the film from him and counterclaimed for infringement by the petitioner (11-16).

Petitioner's reply asserted affirmative defenses of failure to state a claim, laches, and estoppel (17-18).

Such estoppel sustained by the District Court (534, 537), after hearing the defense, was predicated upon an injunction granted against the defendants-respondents in the New York Supreme Court restraining them from infringing on the motion picture, obtained by plaintiff-petitioner's assignor (358) and more particularly upon an agreement entered into between such defendants-respondents and petitioner's assignor pursuant to which defendants-respondents in the broadest language possible, without limitation, covenanted not to in any manner at any time, infringe upon said motion picture (309), the pertinent clauses of which agreement are set forth in the opinion of the Court of Appeals below (Appendix).

At approximately the same time, Machaty commenced an action against the petitioner on his claimed rights, identical with the counterclaim asserted in this case. His case was dismissed by the same judge who tried this case and such

dismissal was affirmed on a consolidated appeal referred to in the opinion below (Appendix).

The undisputed facts are as follows:

In 1932, one Machaty, held by the District Court to be the author of the motion picture Ecstasy and a Czechoslovakian corporation, Elekta Film, entered into an agreement under which Elekta Film produced Ecstasy in return for which it was given unlimited worldwide rights of distribution (436). In 1934, Elekta Film gave defendant-respondent Eureka exclusive distribution rights in the United States until 1939 (363), and Eureka took out copyrights on the film in 1936, with Elekta's consent (301) and in 1940 (304). In 1938, Elekta licensed one Weingarten for American distribution on termination of Eureka's rights (376). Thereafter Weingarten sued Eureka to stop further distribution and obtained the injunction (358) and agreement not to infringe (309) referred to. Weingarten assigned all rights in the agreement and the copyrights to plaintiff-petitioner (321, 324, 378).

In 1947, obviously to evade the injunction and agreement and to lend some color to their actions defendants-respondents having found Machaty in this country entered into a license agreement with him (328) the very language of which shows guilty evasion.

This was respondents' sole defense for their actions, that they had a license from Machaty which was superior to plaintiff's claim through Elekta. The defendants never testified. They merely attempted to prove that Elekta's rights had expired in 1937, that it could give no rights to Eureka, and so none to the petitioner. The Circuit Court held Machaty had no rights (Appendix), defendants might as well have urged a license from a stranger.

Upon the trial defendants-respondents' attorney conceded (75):

> "If Elekta Film is the owner, these plaintiffs are all right, but if Elekta Film is not the owner and Machaty is, then they are out."

In its brief below defendants-respondents stated:

> "It is important also to discuss the case of Machaty v. Astra FIRST for the reason that if Machaty does not succeed in his appeal, then the defendants-appellants Eureka et al. in the other case of Astra v. Eureka may likewise be unsuccessful" (Respondents' Brief, p. 2).

As its introduction to that portion of its brief devoted to this case respondents stated:

> "In approaching the discussion of this case we will have to ASSUME that this court will have reached in the first above mentioned case of Machaty v. Astra the conclusions that Machaty is the author and producer of said film and that he is the copyright owner thereof" (Respondents' Brief, p. 37).

Thus the only issue sought to be presented by respondents was that Elekta had no rights in the film, could give none to Eureka to be passed on to petitioner, that Machaty owned all such rights and if not then petitioner was "all right" in its claims.

Despite holding that Machaty had no rights and in the face of defendants' concessions, the court below reversed the judgment on the ground that the broadly-worded agreement of the defendants did not survive petitioners' distribution rights although it still had legal title to the copyrights and because Elekta was a necessary party-plaintiff and had not been joined or its absence accounted for.

Neither of such claims or objections had been made by defendants before or at the trial or on appeal.

Questions Presented

1. Did the defendants-respondents concede the claim of the petitioner-plaintiff if Machaty had no rights in the motion picture and was this the only issue sought to be litigated by the defendants below? The record irrefutably so establishes.

2. Where a litigant neither pleads, attempts to prove, moves to dismiss or urges upon appeal that a complaint should be dismissed for defect of parties-plaintiff, should the court sua sponte dismiss the complaint upon such ground? The action of the Court of Appeals was contra to its own action and decision in a similar case, *Edward B. Marks Music Corp.* v. *Jerry Vogel Music Co.*, 140 F. 2d 268.

3. May the Circuit Court sua sponte interpret a clearly-worded agreement in a manner not urged by the defendant on trial, the meaning or intent of which was not testified to by anyone, nor the interpretation of the District Court not objected to by the defendant except by way of confession and avoidance that Machaty owned the rights to the picture?

4. A representative of Elekta Film testified on behalf of petitioner. Was not this sufficient manifestation of the consent of Elekta Film to the bringing of the action even within the decision of the court below?

5. Since it was demonstrated without refutation that Elekta Film had been nationalized under the Communist domination of Czechoslovakia, was not this a sufficient showing of why it had not been joined as a party plaintiff and shouldn't the court below have at least followed the procedure it had adopted in similar circumstances in *Edward B. Marks Music Corp.* v. *Jerry Vogel Music Co.*, 140 F. 2d 268, affirmed the judgment and decreed that the proceeds be held in trust for Elekta Film?

6. Should not the court at least have remanded the case for further findings since the order appealed from was interlocutory and the court below had retained jurisdiction?

Reason for Allowance of the Writ

Despite affirming that Machaty had no rights in the picture, the concession by defendants that if that were so this case should be affirmed, the undisputed fact of infringement, the Circuit Court reversed the judgment with leave to start a new suit, on its interpretation of the agreement bottoming estoppel, not urged by the defendants or supported by its broad language and upon the further ground of defect of parties plaintiff never urged by defendants-respondents. Finally within the requirements of the court below the record sufficiently indicates the assent of Elekta to the prosecution of the action. In all events since the judgment was interlocutory the court below should have at least remanded the matter to the District Court for further findings. It is respectfully urged that the court below in deciding a case on a theory of law and an interpretation of a contract not urged by a party departed from accepted practice and the authorities as more specifically demonstrated in the brief annexed hereto.

If the practice indulged in be countenanced no litigant can safely try a case on the issues tendered by an adversary but must always prepare on all conceivable issues even if the relevancy thereof has been negatived by the adversary; if the court below is correct in eking out defenses for the defendants-respondents herein not urged by them, and in effect waived, then a party must try his case not only against his adversary but against the issues thought to be relevant by the Court of Appeals.

As will hereinafter be demonstrated the clarification of the issues presented warrant the granting of the writ.

Wherefore your petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a date to be designated, a full and complete transcript of the record of all proceedings of said Court of

Appeals for the Second Circuit had in this cause to the end that this cause may be reviewed and determined by this Court; that the determination of the Court of Appeals for the Second Circuit be reversed and that petitioner be granted such other further and different relief as may seem proper.

Dated, New York, N. Y., June, 1952.

MELVIN A. ALBERT,
Attorney for Petitioner.

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ASTRA PICTURES, INC.,

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Respondents.

BRIEF IN SUPPORT OF PETITION

Opinions Below

The opinion of the Court of Appeals for the Second Circuit is annexed to the certified transcript of the record filed herein. For the convenience of the Court it is annexed hereto as an Appendix.

No opinion was rendered in United States District Court for the Southern District of New York. The order of the District Court is found at page 527, its findings of fact and conclusions of law commencing at page 532.

Jurisdiction

The judgment of the Circuit Court of Appeals now sought to be reviewed was entered on March 28, 1952. Jurisdiction is invoked under Section 240a of the Judicial Code as amended also known as 28 U. S. Code Sec. 347.

Statutes Involved

Federal Rules of Civil Procedure, Rule 17a.

Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides an action for the use or benefit of another shall be brought in the name of the United States.

Statement of the Case

The summary statement of the case and of the argument is set forth in the petition. The facts are fully set forth in the opinion of the court below printed in the appendix hereto.

Specification of Error To Be Urged

The error to be urged is identical with the reasons for the allowance of the writ as set forth in the foregoing petition.

ARGUMENT

Respondents conceded petitioner's title and the lack of necessity of joining Elekta.

Defect of parties plaintiff, or lack of authority from Elekta Film to commence the action was never pleaded by the defendants-respondents as a defense. At the conclusion of plaintiff-petitioner's case below, no motion to dismiss was made on that ground; the only motion that was

made was to dismiss on the ground that the copyright taken out by defendants-respondents themselves was technically deficient (38). Upon the conclusion of the entire case no such motion was made (295).

Defendants-respondents could not have made such motion for at all times they claimed and attempted to prove that Elekta had no rights of any kind upon which Astra could bottom any claim.

The only concern of defendants-respondents, the only issue tendered by them was that Elekta could not have originally given Eureka any rights which could be assigned to Astra.

Thus in their counterclaim defendants-respondents affirmatively alleged that they distributed the film because of their license from Machaty and specifically alleged "not otherwise" (13); they affirmatively alleged Elekta had no rights in the film because Machaty's rights were paramount (14), they sought judgment that Elekta's rights had expired (15).

Upon the trial, petitioner's rights were conceded; its claim of title from Elekta was admitted as assignee of Elekta (59).

After disclaiming interest in what Astra did and asserting interest only in proving Elekta could give no interest defendants-respondents concede (75):

"If Elekta Films is the owner these plaintiffs are all right, but if Elekta Film is not the owner and Machaty is then they are out."

Finally it was conceded petitioner "got" its rights from Elekta (130) and that the crux of the case was whether Elekta owned the rights or Machaty (71) not whether Astra was authorized to bring suit.

The defendants-appellants tried their case on only one issue—could Machaty give them a right to distribute. No other defense or issue, factual or legal as to title was ever urged and petitioner had the right to try its case on such issue.

On its appeal below absence of Ele
was likewise never urged. On the
eight times in their brief defendants-r
the copyrights were held in trust f
Elekta had no rights. There is not a
mony, a single argument in the record
argument on the appeal that Astra f
Elekta was missing as a party plainti
accounted for. It is certain that not
the court below did the defendants-r
such conception.

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trial, nor a single
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pondents have any

Even had the point been first raise
have been "nevertheless not good" *Ed*
Corp. v. *Jerry Vogel Music Co.*, 140 F

on appeal it would
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2d 268, 270.

The court below should not have su
case on an issue not presented by the
larly where as here the court's decisio
posed to the issue presented.

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efendants, particu-
is diametrically op-

The law is clear that an appellate
amine the record in search for prejudi
not clearly pointed out and rested on
brief of the complaining party and al
considered waived (5 Corpus Juris Se
1230) and the authorities are clear t
not pass upon any point not urged o
it might have been.

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al errors which are
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ndum Sec. 1803, p.
t the court should
trial however much

Jones v. *Tower Production*, 120
Hull v. *Burr*, 234 U. S. 712;
Delamar Mines v. *Mackay*, 104 F
Baxter v. *McGee*, 82 F. 2nd 695;
Maloney v. *Brandt*, 123 F. 2nd 79;
Harrison v. *Pullman Co.*, 68 F.
Bumpus v. *Remington*, 183 F. 2
United Railways v. *West*, 280
Martin v. *Sheely*, 144 F. 2nd 75
Scott v. *W. R. Grace*, 275 F. 340

. 2nd 782;
2nd 271;
nd 826;
507;
S. 234;

Finally the authorities are clear that a party may not take a position on appeal inconsistent with that taken below.

Osgoodby v. *Talmadge*, 45 F. 2nd 696;
Commercial Trust Co. v. *Woodbury*, 77 F. 2nd 478;
In re Victor, 70 F. 2nd 937;
Brigham City v. *Toltec Ranch*, 101 F. 85.

That no issue of the absence of Elekta was raised on trial cannot be denied. Defendants not only were not interested in the absence of Elekta, they continually urged and sought to prove that Elekta had no place in the case since they claimed it had no rights. If by intellectual legerdemain defendants-respondents claim that the issue was presented on appeal, which it was not, the inconsistency of any claim that Elekta was a necessary party plaintiff, against the assertion that only Machaty owned the picture needs no attenuation.

Even though the decision of the District Court may be predicated upon an erroneous ground, and no decision was actually rendered in the *Astra* case that Machaty had no rights, since the Court of Appeals affirmed the dismissal of Machaty's claim, on a consolidated appeal, identical with defendants' counterclaim, the decision was nevertheless, correct; the dismissal of defendants' counterclaim was not disturbed. The situation is not one where no evidence of Machaty's claim was permitted.

Since the record is complete, this Court may and should render its decision on Machaty's claim. *Kustaff* v. *Chaplin*, 120 Fed. 2nd 551, *In re Barnett*, 124 Fed. 2nd 1005. To require all the parties, after four years of litigation, an extended trial, extensive hearings before the Special Master, to start over again in the light of the complete record, would be a miscarriage of justice.

Elekta's consent to the action appears in the record or its absence is accounted for.

One Auerbach was the president of Elekta and its moving spirit. (It is significant that altho he was subpoenaed by the defendants-respondents he was never called by them (213) or cross-examined as to the position of Elekta.) He had a power of attorney to do anything for the corporation (269) owned 93% of its stock (271) and was its only representative since its expropriation and nationalization by the Communist government of Czechoslovakia (263, 292). He anticipated (269) and sat through the whole trial (254) with full knowledge of petitioners' claims and Machaty's claims without objection and testified affirmatively on behalf of petitioner in order to establish that the copyrights were originally taken out by Eureka with the consent of Elekta (262).

That Elekta consented to the bringing of the suit is clear.

Vitaphone Corp. v. *Hutchison,* 28 F. S. 526.

The utter lack of interest of Elekta in the United States' rights is clear from the fact that it sold them to petitioners' assignor for $800 (377). That the cost of the instant litigation far exceeds that sum is clear. Why then in the light of the record should the court below bend over backward to presume absence of consent of Elekta to this suit, against confirmed and habitual infringers (*Patterson* v. *Century Productions,* 19 F. S. 30, *Davenport Quigley* v. *Century Productions,* 18 F. S. 974) when Auerbach's nephew (557, 560) had to sue these very defendants to prevent infringement and obtained an injunction (358) and then released over $5,000 for their covenant never to interfere with the picture (309). The presumption of consent is overwhelming.

It is equally clear that Elekta having taken no steps to protect its copyright clearly acquiesced to Astra's procedure if not its rights.

Holmberg v. *Armbrecht*, 327 U. S. 392;
Nitkey v. *S. T. McKnight*, 87 F. 2nd 916;
Crites v. *Radtke*, 19 F. S. 238;
Fretwell v. *Gillette*, 106 F. 2nd 728;
Isaac v. *Milton Mfg. Co.*, 33 F. S. 732;
Wiegand v. *Trent*, 122 F. 2nd 921;
Egner v. *Schirmer Co.*, 48 F. S. 187;
Davella v. *Harms*, 36 F. S. 843.

Finally the record shows that Elekta, a Czechoslovakian corporation, has been nationalized under Communist regime (292, 293). That petitioner could not serve a nationalized Czechoslovakian corporation is patent. Since it is beyond the jurisdiction of the court and may be legally non-existent that the court could act in its absence is established.

Stuff v. *Cia Budd Feed & Grain Co.*, 42 F. S. 493;
Bourdieu v. *Pacific Western Oil Co.*, 299 U. S. 65, 70.

That the court should have followed the procedure in *Edward B. Marks Music Corp.* v. *Jerry Vogel Music Co.*, 140 F. 2nd 268, and affirmed the judgment, but required the proceeds to be held in trust is patent.

The covenant against infringement was unlimited and the interpretation of the Circuit Court should be reversed.

Eureka, without limitation, covenanted it would not infringe the motion picture Ecstasy (309). The contract contains not a word of limitation. The infringement consisted of obtaining a negative of the motion picture, making new prints of it, and distributing the identical picture with minor changes.

Neither in the pleadings nor on the trial, nor on appeal did defendants-respondents urge that they had the right to distribute because Astra's rights expired or had not been established. Their sole claim as hereinbefore pointed out

was that they had a license from Machaty which the court held was no license.

Not a word of testimony was adduced on the trial, nor even any argument made, seeking to interpret the contract as meaning that they had the right to attempt to infringe against Elekta, on the alleged termination of Astra's rights.

The unrealistic interpretation of the court below is quickly highlighted. The nephew of the president of Elekta went to the expense of attempting to enjoin Eureka and then bought off its threats only for the duration of its contract is what the court presumes to be the intent. And in effect the court says to these confirmed infringers, on an uninterpreted agreement unlimited by language: "You are in no way bound by this covenant for which you received over $5,000. You are not estopped from infringing again if you can get away with it." What else did plaintiff's assignor attempt to buy except freedom from the necessity of re-establishing rights fixed by the injunction at least against these habitual infringers?

It is respectfully urged that the court below erred, particularly in the light of the defendants' failure to urge the point, in presuming that the clear agreement contained limitations, reservations or restrictions in the face of the failure to express them. Such limitations must be expressed and imposed and may not be presumed.

> *American Tobacco Co.* v. *Werkmeister*, 207 U. S. 284;
> *Dielman* v. *White*, 102 F. 892;
> *Dam* v. *Kirk La Shell*, 175 F. 902;
> *Yardley* v. *Houghton Mifflin Co.*, 108 F. 2nd 28;
> *Pushman* v. *New York Graphic Society*, 287 N. Y. 302.

In the face of the clear language of defendants-respondents' covenants, they were estopped from asserting the non-existent rights of Machaty.

Miehle Printing Co. v. *Publishing Corp.*, 166 F. 2nd 615.
Public Ledger v. *Post Printing*, 294 F. 430;
United States Hoffman Machinery Corp. v. *Ricka*, 78 F. 969;
De Laval Separator Co. v. *Vermont Farm*, 135 Fed. 772;
Weiss v. *Hollywood Film Enterprise*, 81 U. S. P. Q. 750.

The decision below is even more incomprehensible in the light of the following statement:

> "Now it may very well be that Eureka did warrant title to the copyrights against hostile claims like Machaty's" (Appendix, p. 28).

The only claim defendants-appellants made was their claimed right through Machaty. Within the court's own reasoning, therefore, did not the warranty at least survive against any claim made through Machaty as well as by Machaty? To urge that defendants-respondents would have had to indemnify any claim made by Machaty but not through Machaty is a complete non-sequitur.

In all events the case should have been remanded for further findings.

The Court of Appeals sua sponte decided as a matter of fact that the record did not reveal the consent of Elekta to bring the action. The District Court made no finding thereon.

Without any testimony thereon in the record, nor even argument on interpretation, the Circuit Court, in the absence of finding thereon by the District Court, differed in the interpretation of the contract against infringement (309) inferentially found by the District Court.

The District Court merely entered an interlocutory order, jurisdiction being retained to make any further order (540).

In the light of the opinion of the Circuit Court as to the interpretation of the record, the most the court should have done is to remand the case for further findings consonant with the opinion.

Edwards v. *Holland Banking Co.*, 75 F. 2nd 713.

CONCLUSION

By reason of the errors of the Circuit Court as pointed out above and the necessity for clarifying the scope of the power of the court to rule sua sponte, the writ of certiorari should be granted.

Respectfully submitted,

MELVIN A. ALBERT,
Attorney for Petitioner.

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 180-181—October Term, 1951.

(Argued February 13, 1952 Decided March 28, 1952.)

Docket Nos. 22249-22250

GUSTAV MACHATY,

Plaintiff-Appellant,

v.

ASTRA PICTURES, INC., MICHAEL M. WYNGATE, INC., MARTIN LICHT,

Defendants-Appellees,

and

OLIVER UNGER and BONDED FILM STORAGE CO., INC.,

Defendants.

ASTRA PICTURES, INC.,

Plaintiff-Appellee,

v.

EUREKA PRODUCTIONS, INC., JEWEL PRODUCTIONS, INC., SAMUEL CUMMINS and ROSE CHATKIN,

Defendants-Appellants.

Before:

AUGUSTUS N. HAND, CHASE and FRANK,

Circuit Judges.

Appeals from judgments in two suits for copyright infringement dismissing on the merits Gustav Machaty's suit against Astra Pictures, Inc., and granting an interlocutory injunction in favor of Astra Pictures, Inc., in its suit against Eureka Productions, Inc. There was diversity of citizenship in Machaty's suit. Astra's claim was based solely on the copyright laws of the United States, 17 U. S. C. Section 25. *Machaty* v. *Astra Pictures, Inc.* affirmed; *Astra Pictures, Inc.* v. *Eureka Productions, Inc.*, reversed.

HENRY PEARLMAN, *for appellant Machaty in his suit against Astra Pictures, Inc.; also for defendants-appellants in the case of Astra* v. *Eureka.*

MELVIN A. ALBERT, *for Astra Pictures in the suit of Machaty* v. *Astra Pictures, Inc.; also for Astra Pictures in the suit of Astra Pictures, Inc.* v. *Eureka.*

FRANK, *Circuit Judge:*

The essential facts are the same in both cases; for that reason, the cases were consolidated on appeal. We will first recount the variegated history of "Ecstasy," and later discuss separately the rights of the parties in the two suits.

Gustav Machaty, then a Czechoslovakian citizen, wrote, directed and produced in 1931 and 1932 a film, familiar to American movie audiences as "Ecstasy."[1] Machaty contracted on July 12, 1932 to give Elekta-Film, a Czechoslovakian corporation, world-wide distribution rights to the film, in return for certain royalties. Elekta was to control all foreign licensing of the film until such time as production costs were recouped. (There was evidence that they had still not been recouped up to the time of the suit.) Machaty claimed that a supplementary contract was made with Elekta a few months later, limiting Elekta's distribu-

[1] There was some dispute in the lower court as to whether Machaty was the original author of "Ecstasy." The trial judge found that he was.

tion control to five years and requiring Machaty's express consent to all foreign licensing. The existence of this modifying agreement was disputed in both suits; the trial judge found against Machaty's claim that the agreement cut short Elekta's rights after 1937. Meanwhile, in 1934, Elekta licensed Eureka, an American corporation, to act as exclusive exhibitor of the film in the United States until 1939. Eureka took out American copyrights in its own name on the film in 1936 and 1940. In 1938, Elekta licensed Weingarten, Astra's predecessor, for the exclusive rights to American showings when Eureka's license expired in 1939. Weingarten and Wyngate to whom he assigned part of his rights in "Ecstasy" brought suit against Eureka in 1940 to stop Eureka from further showing the film, and obtained from the New York Supreme Court an injunction and money damages against Eureka. In settlement of the money damages, Eureka made a private agreement to assign to Weingarten and Wyngate the totality of Eureka's interests in all properties—tangible and intangible, including copyrights—which related to "Ecstasy." In 1943 Astra succeeded to their rights. In 1947 Machaty, refusing to recognize Astra's claim to "Ecstasy's" distribution rights, licensed Eureka to exhibit the film in this country. Machaty in 1946 had obtained a Czechoslovakian judgment, and in 1948 a default judgment in New York, declaring that he and not Elekta had sole claim to world-wide distribution rights. In the present suit against Astra, Machaty wants damages for Astra's infringement of his distribution rights since 1944, and injunction against any future infringement, and a trust in favor of Machaty declared upon the copyrights Astra owns, or, in the alternative, cancellation of these copyrights. Astra, in its suit, wants damages based upon infringement of its registered copyrights for Eureka's deliberate showings of the film over Astra's objections. In the district court Machaty's suit was dismissed on the merits, but Astra, in its suit, was granted an interlocutory judgment against Eureka, with the question of damages referred to a master.

Machaty v. *Astra Pictures, Inc.*

Machaty's case in the district court was like Leacock's man who "flung himself upon his horse and rode madly off in all directions."[2] On study, however, it appears that whether Machaty's case stands or falls depends on a few basic facts.

The first is whether or not Machaty presently owns the right to license distribution of "Ecstasy," or whether he gave away that right to Elekta in 1932. Machaty seems to concede that this right went to Elekta for an indefinite period by the contract of July 1932, a contract which Astra claims is still in effect. But Machaty asserts that a new agreement was signed in September 1932, limiting Elekta's rights to five years from that date and requiring Machaty's express approval of all foreign licensees. Had this September 1932 contract been proved, it might well follow that Astra's license from Elekta was void, and, unless barred by laches, Machaty would now be successful in his suit against Astra for infringing his exclusive rights.

The trial judge refused to believe Machaty's story that there was a September contract limiting Elekta's distribution rights. *Auerbach, an officer of Elekta* who was supposed to have signed the September agreement, denied its existence. Machaty could not produce the original; he could not testify with any certainty where it was or what had happened to it. He tried to introduce a photostat of an alleged copy of the September agreement, which copy had been made from the original by either a friend or Machaty's lawyer. This copy was certified by the Czechoslovakian Consulate General in Paris and by the Regional Court of Commerce in Prague; neither authority had ever seen the original. The Court of Commerce verified the copy on the basis of testimony it had heard in a lawsuit between Machaty and Elekta. Such certifications would not satisfy the requirements of 28 U. S. C. 1741 or Rule 44(a) Federal

[2] Leacock, *Gertrude the Governess.*

Rules of Civil Procedure governing the admission in evidence of foreign documents of record, which the appellants invoke to authorize admission.[3] But whether or not a private contract like this one had to satisfy those statutory requirements at all, we think that the judge did not abuse his discretion in refusing to accept the copy.

Machaty sought to prove his present ownership of distribution rights in another way. He ried to introduce a Prague judgment he won in 1946 against Elekta, and a similar judgment obtained by defaul against Elekta in New York in 1948. Both judgments decided that Machaty was the present owner of the distribution rights as against Elekta. The trial judge excluded both judgments because they could not bind Astra, which was ot a party to either the Prague or the New York suit.[4] This was correct. As

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[3] "Section 1741. *Foreign Documents, Gen ally; Copies.*

"A copy of any foreign document of reco or on file in a public office of a foreign country or political subdivision thereof, certified by the lawful custodian thereof, shall be admissible in evidence when authenticated by a certificate of a consular officer of the United States, resident in such foreign country, under the seal of his office, that the copy has been certified by the lawful custodian."

"Rule 44(a) of the Rules of Civil Proced e:

"An official record or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied with a certificate that such officer has the custody. * * *

"If the office in which the record is kept in a foreign state or country, the certificate may be made by a secretary of embassy or legation, consul general, consul, vice-consul, or consular agent or by any officer in the foreign service of the United States stationed in the foreign state or country in which the record is kept, and authenticated by the seal of his office."

[4] He also excluded the Prague judgment ause it was not duly authenticated according to 28 U. S. C. 1741 and Rule 44(a) F. R. C. P. See note 3, *supra*. There was a question as to whether the United States official's certification evidenced only the fact that the Czechoslovakian certifying officer was an official translator for the court or whether it also evidenced that the zechoslovakian certifier was the lawful custodian of the judgment.

between Machaty and Astra, Astra might be able to utilize defenses to Machaty's claims which were unavailable to Elekta, *i.e.*, laches or estoppel. Since the Machaty-Elekta judgments were not dispositive of Astra's rights, no fact decided in the Machaty-Elekta suits could bind Astra in its own suit; thus the judgments could not be received to prove the existence of the September agreement—an essential fact in the Machaty-Astra litigation.

Machaty attempted in the trial court to base his action on a copyright theory that ran like this: American copyrights taken out by Eureka as a sub-licensee of Elekta, and later assigned to Astra, were impressed with a trust in favor of Machaty, the author; therefore, even if Astra's license from Elekta was valid, the equitable title to the copyrights reverted to Machaty when Astra's license terminated in 1944.[5] The trouble with this theory is the July 1932 contract, signed by Machaty, which gave Elekta world-wide distribution rights. Presumably this contract allowed Elekta or its assigns to procure copyrights necessary for such distribution and to control the use of such copyrights for the duration of the contract. Machaty did not, indeed, in the trial court dispute such an interpretation of the July 1932 contract, but relied solely on establishing the existence of a September 1932 contract, limiting Elekta's controls. One must conclude, then, that any trust impressed upon the copyrights was in Elekta's favor, at least while Elekta controlled world-wide distribution rights. If Elekta is still in control of these rights, then the equitable interest in

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[5] The trial judge said that Machaty's rights in any copyrights taken out by Eureka could not be determined in this suit, because Cummins, an officer of Eureka, who was named in the 1940 copyright as author of the story, was not a party to the suit. This was an erroneous ruling, for Astra, the defendant, was the present owner of the copyright; and had received its title from Eureka in whose name the copyrights were taken out. The equitable title to the copyrights in so far as it affected Machaty could thus be determined in a suit between Machaty and Astra. The error, however, did not prejudice Machaty's case. See discussion in text, *supra*.

copyrights, taken out by its assignees, reverts to Elekta and not Machaty.

On this appeal Machaty claims that he was entitled to copyright protection in the United States because he owned a valid Czechoslovakian copyright, obtained by mere publication in that country. Section 8 of the Copyright Act and § 202.1 of the Proclamation Copyright Relations Act (17 U. S. C. § 9 and 37 C. F. R. Ch. II, Pt. 202), he says, afford automatic protection in the United States for the holders of Czechoslovakian copyrights. We need not consider what would be the effect on Machaty's case in the light of his contract with Astra, if he had proved a valid Czechoslovakian copyright, for the fact is that he did not. He merely showed that he had published his film in that country; he did not prove that publication alone is enough under Czechoslovakian law to confer upon the author a valid copyright entitled to United States protection. See *Heim* v. *Universal Pictures Co.*, 154 F. (2d) 480 (C. A. 2). Nor did he prove his exception from the general rule that an author—even an alien author—must take certain formal steps to obtain an American copyright. 17 U. S. C. § 8.

The trial judge found that, even if Machaty had valid rights since 1932, yet he was guilty of laches in waiting so long to pursue them: "He has permitted defendants to expend large sums of money and widely publish, advertise, and show the picture in the United States without any protest on his part so I find also that plaintiff is guilty of laches and cannot recover in an equitable action on this case." So far as Astra itself is concerned, any money it spent in exploiting the film must have been spent between 1943, when it acquired rights in the film, and 1944, when its license terminated. Expenditures after 1944, if not made pursuant to any valid license, but illegally, should not be used as the basis of an equitable defense of laches or estoppel. Any of Astra's predecessors, however, on the evidence in this case, had good defenses by way of laches to Machaty's claims. It can be reasonably assumed that Astra acquired their interests in "Ecstasy," relying upon Machaty's in-

action up to that time, and that all defenses of Astra's predecessors to Machaty's claims were transferred to Astra by the mesne assignments.

All Machaty's theories of action then lead to a dead end. He failed to prove any substantial interest in the film worthy of protection. His suit was deservedly dismissed on the merits. Affirmed.

Astra Pictures, Inc. v. *Eureka Productions, Inc.*

Astra sued and recovered in the trial court for an alleged infringement by Eureka of Astra's copyrights, which Eureka had assigned to Astra in 1941. Eureka, newly licensed by Machaty in 1947, was exhibiting the film over Astra's protest. The copyrights in question were taken out by Eureka in 1936 and 1940 while it was holding itself out as a valid licensee of Elekta. In the 1941 settlement agreement, made pursuant to the New York judgment enjoining Eureka from showing the picture after its license had run out, Eureka assigned these copyrights to Weingarten and Wyngate, Astra's assignors. The trial judge found for Astra in this suit on the following grounds:

"In an action brought by Max Weingarten and Michael M. Wyngate, Inc., as plaintiffs, against Eureka Productions, Inc., Samuel Cummins and Rose Chatkin, as defendants, in the Supreme Court of the State of New York, it was adjudged on March 26, 1941, that Max Weingarten and Michael M. Wyngate, Inc., exclusively owned all the rights in and to the motion picture entitled 'Ecstasy,' and all the rights of distribution, exploitation and exhibition of the same, and plaintiff in said action recovered a judgment in its favor against the defendants for the sum of $5,425.43.

"On August 22, 1941, these defendants entered into a written contract wherein and whereby, in consideration of Max Weingarten and Michael M. Wyngate, Inc., agreeing to cancel said judgment and assigning, transferring and setting over unto Michael M. Wyngate, Inc. and Max Weingarten, the moving picture film known as 'Ecstasy', and all properties pertaining thereto, both tangible and intangible,

and also as a part of said settlement and written contract, the said defendants in that suit agreed to transfer and set over unto said Max Weingarten and Michael M. Wyngate, Inc., their property rights in and to said two copyrights above referred to and warranted the title to the same, and also the title and the right to convey said moving picture, and all properties pertaining thereto, both tangible and intangible, including the distribution, exhibition and exploitation or marketing or disposition of said moving picture or the copyright thereto. Said defendants at said time and in said writing covenanted and warranted that the exercise by Michael M. Wyngate, Inc., its successors and assigns, of all rights in connection with the said motion picture and the use and disposition of all properties in connection therewith, should be free and unprejudiced.

"Pursuant to such written agreement, the judgment above referred to against the defendants was settled by the cancellation of said judgment, and by the transfer to the plaintiffs of the motion picture 'Ecstasy,' and all property pertaining thereto, both tangible and intangible."

The provisions of the 1941 settlement agreement to which the judge referred are as follows:

"3. In consideration of your agreement to perform the acts hereinafter provided, we, the undersigned, Eureka, Cummins, Chatkin and Jewel Productions, Inc., do hereby sell, assign, transfer and set over to you, irrevocably and without reservation of any kind whatsoever, all properties, tangible and intangible, pertaining to that certain motion picture now or previously known as 'Ecstasy,' including all versions thereof, whether such properties are now in the control of Eureka, Cummins, Chatkin or Jewel Productions, Inc., or any of them, or their agents, representatives, employees, licensees, assignees, affiliates, subsidiaries, relatives or any other party or parties, firm, association or corporation claiming from, through or under Eureka, Cummins, Chatkin or Jewel Productions, Inc. * * * Also included in the conveyance, grant and transfer, * * * are, but without

limitation, the copyrights in said picture, the copyright certificates thereof bearing numbers Class L #10141 and Class L 6528 respectively, together with all rights of whatsoever kind and nature, flowing from or pertaining to said copyrights, whether now in being or hereafter created or discovered, as well as all rights in and to the said motion picture and all matters contained therein, or upon which the said picture or any part thereof is based. * * * All grants, conveyances and assignments hereunder on the part of Eureka, Cummins, Chatkin and Jewel Productions Inc. are irrevocable and without reservations of any kind on their part, it being the intention, and the said Eureka, Cummins, Chatkin and Jewel Productions Inc. hereby agreeing, that they hereby divest themselves, and each of them, of any and all rights of whatsoever kind and nature, in and to the said picture and all properties, tangible and intangible, relating thereto, it being agreed that all of such properties, tangible and intangible, and all rights therein, are hereby unqualifiably conveyed, transferred and set over unto the said Michael M. Wyngate, Inc., its successors and assigns. * * *

"6. Eureka, Cummins, Chatkin and Jewel Productions Inc. hereby represent, covenant and warrant that there are no liens, charges, encumbrances or liabilities of any kind whatsoever, against any of the properties, tangible and intangible, conveyed, transferred and assigned hereunder to Michael M. Wyngate, Inc., nor are there any outstanding claims or commitments of any kind whatsoever in connection with the said picture or the property thereof, tangible or intangible, whereby the distribution, exhibition, exploitation or any other handling or marketing or disposition on the part of Michael M. Wyngate, Inc., its successors and assigns, of the said picture, or the copyrights thereof, or any other rights and properties therein, tangible or intangible, shall in any way be impeded or interfered with, the said Eureka, Cummins, Chatkin and Jewel Productions Inc. hereby representing, warranting and covenanting

that the exercise by Michael M. Wyngate, Inc., its successors and assigns, of any and all rights in connection with the said picture, and the use and disposition of any and all properties in connection therewith, shall be free and unprejudiced.

"7. We agree, and it is of the essence of this agreement, that we will at all times respect, observe and obey the terms of the injunction against us hereinabove mentioned, and we further covenant and agree that we shall not at any time use, employ or include the word 'Ecstasy' in or as part of the title, sub-title or advertising slogan or appeal in connection with any literary, dramatic or motion picture material or medium."

Astra could normally bring this suit only if it were the valid owner of these copyrights. Astra must have received all of Eureka's rights in the copyrights by valid assignment;[5a] and, in addition, Eureka must have had authority to take out the copyrights in its own name, and to assign those copyrights, free and clear of any liabilities which would now interfere with Astra's title. See *Quinn Brown Public Corporation* v. *Chilton Co.*, 15 F. Supp. 213 (S. D. N. Y.); *Mifflin* v. *R. H. White Co.*, 190 U. S. 260. On this record, we cannot say that Astra has been shown to be the valid owner of the copyrights. Our doubts about Astra's legitimate ownership arise from the following: Elekta licensed Eureka for five years and allowed Eureka to take out copyrights in Eureka's own name. But the contract meant, we think, that, at the end of those five years, Eureka was to assign those copyrights to Elekta or Elekta's new licensee. That new licensee (here it was Weingarten and eventually Astra) would similarly hold

[5a] Eureka also challenged the validity of Wyngate's assignment to Astra in 1943, because it was not filed within three months following its execution, as required by §44 of the Copyright Act, Title 17. But that section protects only subsequent purchasers and mortgagees of the copyright assigned, and does not invalidate the title of the assignee as against infringers. See *New Fiction Pub. Co.* v. *Star Co.*, 220 F. 994 (C. A. 2).

the copyrights during his license to facilitate full exercise of his exhibition rights. At the end of his license, he too would give the copyrights back to Elekta or pass them on to Elekta's new assignee. The arrangement, so far as we can tell, came to this: Eureka took out the copyrights in trust for Elekta, the equitable owner. Weingarten took those copyrights from Eureka, subject to the same trust. See *Maurel* v. *Smith*, 271 F. 211 (C. A. 2); *Cohan* v. *Richmond*, 86 F. (2d) 680, 682 (C. A. 2); *Edward Marks Music Corp.* v. *Jerry Vogel Music Co.*, 140 F. (2d) 268 (C. A. 2); *Bisel* v. *Lander*, 1 F. (2d) 436 (C. A. 3). If all this is true, then Astra still has legal title to the copyrights only because of its wrongdoing in not returning them to Elekta when Astra's license ran out in 1944. In the circumstances, we would not usually allow Astra to sue for infringement without showing (1) a continuation from Elekta of its license or copyright rights after 1944, or (2) joinder of Elekta as a party to this suit. Cf. *Edward Marks Music Corp.* v. *Jerry Vogel Music Co., supra.* For reasons stated later, we shall somewhat depart from such a ruling here.

Astra conducted its case in the trial court on the theory that its chain of title to the copyrights did not have to be proved because Eureka was estopped from challenging Astra's title on any ground. In the 1941 settlement agreement, Eureka warranted to Astra the good title to these copyrights and promised uninterrupted enjoyment of them. The broad language of Eureka's covenants of good title is reprinted above; upon this language the trial judge relied in finding total estoppel on Eureka's part to dispute Astra's title. Now it may very well be that Eureka did warrant title to the copyrights against hostile claims like Machaty's, and, to this extent, we tend to agree with the trial judge that Eureka cannot now itself challenge Astra on the basis of such title defects. The broad language of Eureka's covenants would seem to prohibit such a result. But that kind of estoppel does not dispose of this case. We, like the trial judge, would have to find that Eureka additionally warranted title against the claims of Elekta which both parties

knew at the time controlled the world-wide distribution rights, and from which both parties admittedly derived their own alleged rights to show the picture for a limited number of years.

The 1941 settlement was made pursuant to a judgment for an injunction and money damages granted Weingarten and Wyngate in their suit against Eureka. The New York Supreme Court, in granting the injunction, recognized in its findings of fact [6] that both Weingarten and Eureka

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[6] "7. That in and by said agreement of September 19th, 1934, it was agreed and provided therein that the exclusive license and rights were granted to defendant Eureka Productions, Inc. for a period of five years from the day of delivery of the first print or copy of such film.

"18. That on December 20th, 1938, Elekta-Film A. G. entered into a written contract with plaintiff, Max Weingarten, wherein and whereby Elekta-Film A. G. granted to plaintiff, Max Weingarten, the exclusive distribution, exploitation and exhibition rights in and to such motion picture production entitled 'Ecstasy,' for the territory of the United States of America, for the period of five years, commencing immediately with the expiration of the aforementioned distribution contact between Elekta-Film A. G. and defendant Eureka Productions, Inc., dated September 19th, 1934.

"21. That thereupon plaintiff, Max Weingarten, by virtue of his aforementioned distribution contract with Elekta-Film A. G. dated December 20th, 1938, immediately succeeded to the ownership and became, and now is, the owner of the exclusive distribution, exploitation and exhibition rights, and all other rights, in such motion picture production entitled 'Ecstasy,' for the territory of the United States of America, for the period of five years, commencing with the expiration as aforementioned of the distribution and exhibition rights and license of defendant Eureka Productions, Inc., in such motion picture production entitled 'Ecstasy,' for the territory of the United States of America, for the period of five years, commencing with the expiration as aforementioned of the distribution and exhibition rights and license of defendant Eureka Productions, Inc., in such motion picture production; and that by virtue of the aforementioned assignment as made by plaintiff, Max Weingarten, to plaintiff Michael M. Wyngate, Inc., plaintiff Michael M. Wyngate, Inc., became and now is the owner of a sixty per cent (60%) interest in the exclusive distribution, exhibition and exploitation rights in such motion picture production, as granted under the aforementioned distribution contract dated December 20, 1938, between plaintiff, Max Weingarten, and Elekta-Film A. G."

obtained their alleged rights in the films as licensees of Elekta, and that Weingarten's rights superseded Eureka's because Eureka's license from Elekta had expired, and Weingarten's was still in effect. We think its injunction, limited by these facts, must be construed to prohibit Eureka's interference with Weingarten or his assigns for as long as Weingarten was a validly licensed exhibitor; since, as soon as Weingarten's license ended, he had no rights in the film worthy of protection. Weingarten's and Eureka's settlement agreement, made against this background, must also, we think, be construed to bear out what both parties knew—*i.e.*, that Weingarten had valid rights in the film until 1944 only, as a licensee of Elekta. As a consequence, we think Eureka promised to respect Weingarten's rights only so long as they existed, in fact. Eureka turned over all its properties in the film—tangible and intangible—for use by Weingarten while he was a valid licensee of Elekta. We think it an unreasonable construction of the agreement to say that Eureka promised never to challenge the right of Weingarten or his assignees to show the picture whether or not they were validly licensed to do so. It is much more likely that both parties recognized, when the copyrights were transferred, that they had been obtained pursuant to Eureka's license from Elekta and on behalf of the latter, with Elekta's equitable rights to become operative after its licensee's monopoly had terminated. This is the way we construe the 1941 settlement agreement. Eureka is not then permanently estopped from challenging Astra's title at least on the ground that Astra has not established its equitable ownership of the copyrights as far as Elekta is concerned.

The case, then, in the absence of a valid estoppel on Eureka's part to challenge Astra's title, must be decided on the ground of Astra's right to hold the copyrights at present. Since no proof of Astra's authorization from Elekta to hold the copyrights or to bring this suit has been presented, the trial judge should have dismissed Astra's suit, and we must therefore reverse the interlocutory judgment granted below. This dismissal will not, of course, prejudice any later suit brought by Astra or its valid assigns against Eureka.

In *Machaty* v. *Astra Pictures, Inc.*, judgment affirmed;

In *Astra Pictures, Inc.* v. *Eureka Productions*, judgment reversed.